(22) (21)

Nos. 91-261 and 91-274

In The
Supreme Court of the United States
October Term, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioners,
v.
ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.,
Respondents.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS,
Petitioners,
v.
ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.,
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On Writ of Certiorari To The
United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* UTILITY CONTRACTORS ASSOCIATION OF NEW ENGLAND, INC. IN SUPPORT OF RESPONDENTS

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September, 1992

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INTEREST OF AMICUS

The Utility Contractors Association of New England, Inc. (UCANE) is a non-profit corporation with a principal place of business in Quincy, Massachusetts. UCANE is a trade association; its members include union and non-union contractors, materialmen, suppliers and others who are engaged in public construction in

Massachusetts and other New England States. UCANE represents its members in dealings with governments and in litigation challenging governmental actions that illegally interfere with its members' rights to do business.

UCANE members have been awarded construction contracts for the Massachusetts Water Resources Authority (MWRA) valued in the tens of millions of dollars, including contracts for work on the Boston Harbor Cleanup Project. Its members have been awarded and have successfully completed hundreds of other contracts for the Commonwealth of Massachusetts valued at many hundreds of millions of dollars. In the future, its members intend to bid on other contracts advertised by the Commonwealth and MWRA.

In March 1990, UCANE filed an unfair labor practice charge with the National Labor Relations Board (NLRB) challenging the legality of the Project Labor Agreement (the "Agreement") between MWRA's representative, Kaiser Engineers, Inc. (Kaiser) and the Building and Construction Trades Council (BCTC). The NLRB's Regional Director for Region I declined to issue a complaint, concluding that the Agreement was legal. *Building & Construction Trades Council (Kaiser Engineers, Inc.)*, Case 1-CE-71, GC Advice Memo (June 25, 1990) (Pet. App. 88a-93a).[1]

UCANE is the plaintiff in a civil action in Massachusetts Superior Court, *UCANE v. Commissioner of the Massachusetts Dept. of Public Works*, ("DPW") Mass. Super. Ct. C.A. No. 90-3035, challenging a union-only requirement for the five-billion-dollar Central Artery-Third Harbor Tunnel Project that is similar to the MWRA's Agreement and Bid Specification 13.1. UCANE's suit primarily challenges the bid specification as a violation of

[1]The NLRB examined the matter on the assumption that Kaiser was not the agent of MWRA but was an independent "employer" within the meaning of the National Labor Relations Act (NLRA), 29 U.S.C. §151 *et seq.* Pet. in BCTC v. ABC, 84a n.3. As shown below at pp. 22-25, this assumption is false. The NLRB Regional Director specifically declined to decide any state law issues on the merits. *Id.* at 87a n. 13. UCANE chose not to appeal.

Massachusetts law. The Massachusetts Appeals Court dismissed as moot UCANE's appeal from the denial of injunctive relief because the DPW conceded that it was bound by the First Circuit's decision in the instant case; DPW promised not to enforce its union-only requirement as long as the First Circuit's decision remains law. *UCANE v. DPW*, 29 Mass. App. Ct. 726, 565 N.E.2d 459 (1991). The Massachusetts Superior Court has delayed further action on UCANE's suit pending the outcome of the instant suit. Order for Modification of Tracking Schedule, Aug. 13, 1992. Thus, this case may decide the rights of UCANE and many of its members. All parties have consented to the filing of this amicus brief.

STATEMENT OF THE CASE

UCANE accepts and adopts the Respondents' Statement of the Case.

SUMMARY OF ARGUMENT

MWRA's Bid Specification 13.1 would force all general contractors and sub-contractors on the Boston Harbor Clean-up Project to execute the Agreement; that, in turn, would require them to be bound by the BCTC's collective bargaining agreements. MWRA's requirement would have a devastating impact on construction contractors in Massachusetts. In practical effect, MWRA's scheme would seriously disturb the balance between labor and management that Congress struck in the NLRA. The multi-billion Harbor Project is so large that the MWRA's scheme will disrupt the entire Massachusetts construction industry. Moreover, upholding MWRA's strategy would set a precedent for excluding from all public sector contracts all contractors who choose to negotiate their own collective bargaining agreements and all non-union contractors.

MWRA's forced unionization strategy is not saved from preemption by the theory that it is a legitimate response to state procurement constraints or to local economic needs. To the contrary, MWRA is acting well beyond its state law authority and contrary to Massachusetts procurement laws.

Considering the pervasive state regulatory scheme in which MWRA operates and from which this case arose, MWRA's claim that it is a mere "proprietor" operating pursuant to state law is patently false. Massachusetts has created a web of state laws governing public works contracts in meticulous detail. These laws inextricably intertwine proprietary and regulatory effects and purposes. Under state law, MWRA's bid specification is a regulation. In this state law context, the only rule of federal preemption that safeguards Congress's intent to bar state regulation of certain economic weapons is the rule implicit in this Court's precedents: state action is preempted when it directly and substantially interferes with the protected activities, even if the state claims to be acting as a proprietor. Moreover, state law prevents MWRA from using Kaiser Engineers as its agent and then contending that Kaiser's participation exempts the scheme under NLRA §8(e) and (f) from preemption.

Accordingly, the First Circuit correctly decided that the NLRA preempts MWRA's scheme.

ARGUMENT

I. MWRA'S ACTION, IF UPHELD, WOULD HAVE A DEVASTATING REGULATORY IMPACT ON CONTRACTORS.

A. *MWRA's Action Will Adversely Affect Construction Contractors.*

MWRA's requirement that successful bidders execute its Agreement interferes with the free collective bargaining guaranteed by the NLRA and disturbs the balance of economic power between labor and management that Congress has struck. This violation of a federally protected right, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), 493 U.S. 103 (1989), would have several ruinous effects on contractors such as the members of UCANE, effects that would extend far beyond the Harbor Project.

Most obviously, non-union contractors would be hurt. They have exercised their federal right not to sign pre-hire agreements. MWRA would compel them to choose between their right to negotiate with their employees the terms and conditions of employment

and their right to a contract to which they are otherwise entitled.

The injury extends to union contractors as well. Contractors who have previously signed collective bargaining agreements with unions governing the geographic area regulated by the Agreement would be forced by MWRA to either sign the Agreement (which would then supersede their own agreements) or forfeit their contract awards. MWRA would effectively usurp the union contractors' right to negotiate the terms and conditions of their collective bargaining agreements.

The Agreement and Bid Specification would tilt the federally defined balance between labor and management in collective bargaining in the private sector strongly in favor of unions. MWRA will spend more than six billion dollars on the Harbor Project. The state will spend another five billion dollars on the Central Artery Project which has a similar union-only project labor agreement that will stand or fall with MWRA's Agreement. *UCANE v. Commissioner of DPW*. These two "mega-projects" will provide a large proportion of the construction industry jobs in Massachusetts for the next decade.

Although both agreements ban strikes on the two projects in return for the union-only strictures, they do not prevent signatory unions from striking private sector employers on private projects. Indeed, the agreements would encourage such strikes. MWRA's Agreement incorporates by reference two dozen collective bargaining agreements between unions and multi-employer organizations. All increases in wages and other benefits the unions win in future collective bargaining agreements are automatically incorporated by reference as well. The Harbor and Artery Agreements guarantees the unions thousands of jobs for their members, jobs they can use as a base to finance strikes against private contractors. In such strikes BCTC's unions could assess their non-striking members employed on the two mega-projects to subsidize benefits for the strikers. This would increase the likelihood and length of strikes. It would require contractors who are compelled to sign the Agreement to finance strikes against themselves on the private sector projects. This disturbs the labor-management balance struck by Congress in

the NLRA. *Lodge 76, International Association of Machinists v. Wis. Employment Relations Commission*, 427 U.S. 132, 146 (1976).

It would increase the probability of costly wage and benefit concessions and the chance of onerous work rules being included in future private collective bargaining agreements negotiated during the ten-year life of the project.

Thus, each time the unions use their increased clout against local employer trade associations to get increased wages and other improvements in the terms of employment, these increases will be extended automatically to their members working on the Harbor Project. The result would be an open-ended feedback cycle tipping the balance further and further toward labor and inflating the costs of labor on both private and public works projects.[2] Consequently, the Agreement fails to achieve the purpose of the typical private "pre-hire" agreement of enabling each contractor to "know his labor costs before making the estimate on which his bid will be based."[3] U.S. Br. 11 *quoting NLRB v. International Assn. of Bridge & Iron Workers*, 434 U.S. 335, 348 (1978). Pet. Br. 10, *quoting* H.R. Rep. No. 741, 86th Cong., 1st Sess. 19 (1959).

B. *Upholding MWRA's Action Would Permit Excluding Non-Union Contractors from All Public Works Contracts.*

There is no distinction under the NLRA between large and small construction projects. The Petitioners suggest that MWRA

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[2]Furthermore, Kaiser, the alleged "employer" that signed the Agreement will pay none of these increased costs except perhaps in those rare instances when Kaiser briefly steps beyond its management role and hires a few craft workers to deal with temporary emergencies.

[3]Construction industry labor agreements typically run only one to three years (as illustrated by the agreements incorporated into the Project Labor Agreement as Schedules A and B). As each contract expires, each union will then automatically get the raises that it has negotiated in other private contracts. There is no way that MWRA or anyone else can predict how high the feedback cycle it has created will drive up wages. Hence, there is no way that it can predict, let alone cap, labor costs over the life of the Harbor Project.

needs extraordinary flexibility to manage the extraordinary complexity of the multi-billion-dollar Harbor Project. Pet. Br. 4-525-26. But great projects, like great cases, can make bad law. *See Northern Securities Co. v. U.S.*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). If MWRA can condition public works contracts on sacrificing the right to bargain collectively, then every town, school board and water board in the country can demand the same sacrifice whenever it pleases. This action directly addresses a six-billion-dollar project but it may set a precedent for every pot-hole filling and sewer repair in the nation.[4]

A decision reversing the court below would set a precedent for politicizing the collective bargaining process. Congress intended to leave that process "unregulated" and "controlled by the free play of economic forces." *Machinists*, 427 U.S. at 144. If each agency could impose union-only requirements, then collective bargaining, which Congress intended to be an economic contest between private parties, would be replaced by a political contest between public officials. Moreover, the balance of political power could tip against unions elsewhere. If a state can impose a union-only requirement, as MWRA has done, then another state can impose a no-union rule. No matter what the outcome, such maneuvers substitute political patronage for the "free play of economic forces"

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[4]Supposing that a legal distinction could be drawn between the Harbor Project and smaller projects it would cut against applying the limited exemption from preemption under NLRA §8(f) to MWRA's scheme. As Petitioners and the United States concede, §8(f) was intended to address the special needs of the construction industry arising from the brevity of employer-employee relations on construction projects. Petitioners' Br. at 9-10; U.S. Br. at 11, 28. But the Harbor Project is far from brief: it will last at least 10 years and many of the major contracts awarded will run for at least several years; some will run for the life of the Project. Thus, there is sufficient time to follow the NLRB's usual, non-construction industry rules for certifying a union as the employees' collective bargaining agent.

that Congress has mandated in the NLRA.[5]

II. MWRA'S ACTION IS CONTRARY TO STATE LAW AND SO CANNOT BE JUSTIFIED AS ADVANCING SPECIAL STATE INTERESTS.

Petitioners' argument, Pet. Br. 35, that MWRA's actions can be "defended as a legitimate response to state procurement constraints or to local economic needs," *Wis. Dept. of Industry v. Gould, Inc.* 475 U.S. 282, 291 (1986), is wrong. MWRA has stretched its state authority far beyond the breaking point. It has no authority to authorize, ratify, or incorporate the Agreement into its bid specifications. Rather than responding to state procurement constraints it is violating them.

A. *This Case Arises in the Context of A Pervasive State Regulatory Scheme Governing Contracts for Public Works Projects that Is the Exclusive Source of MWRA's Authority to Set Bidding Procedures.*

Although this case so far has been fought almost entirely on issues of federal law, it arises in the context of a pervasive state regulatory scheme. Massachusetts has the distinction of having the most regulated public construction contracting processes in the country. C. NOBLE & J. MYERS, MASSACHUSETTS CONSTRUCTION LAW 1990 74 (1990). Its statutes override the ordinary rules of private contract law regarding public bidding and public works contracts. *Id.* This state law background undercuts MWRA's claim that this is a states' rights case in which a state "proprietor" is being unfairly denied the right to do what all other proprietors can do. A survey of the state regulatory scheme and the ways in

[5]*Compare. Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (O'Connor, J.) (1989) (in racial context "the concern that a political majority will more easily act to the disadvantage of a minority . . . would seem to militate for, not against, the application of heightened judicial scrutiny"), 523-24 (Scalia, J., concurring). Although there is no racial aspect to this action, the MWRA's compelling employees to join unions is state action which may intrude on their First Amendment freedom of association.

which MWRA has distorted it supports the First Circuit's decision.

As an instrumentality of the Commonwealth, MWRA obtains its authority from its enabling act, 1984 Mass. Acts No. 372, *codified at* M.G.L. c. 92 App., §1-1 *et seq.* (hereinafter "Act 372" or "Enabling Act"). That act defines MWRA as "a public agency" subject (with certain limited exceptions) to the pervasive regulatory scheme governing public contracts. *Id.* at §8(g), 7(g). MWRA asserts that these laws empower it to issue its Bidding Specification 13.1 that commands all general contractors and sub-contractors to execute the Agreement as a condition of obtaining contracts to which they would otherwise be entitled under state law. However, as discussed below, Massachusetts law does not permit MWRA to impose the Project Labor Agreement through its bid specifications.

B. *MWRA is Violating the Massachusetts Constitution.*

Article XXX of the Declaration of Rights of the Massachusetts Constitution provides that "the Executive shall never exercise the legislative and judicial powers or either of them . . . to the end it may be a government of laws and not of men." When an administrative agency acts beyond the scope of its delegated authority its conduct is unlawful. *New England Medical Center, Inc. v. Rate Setting Commission*, 384 Mass. 46, 423 N.E.2d 786 (1981); *Bureau of Old Age Assistance of Natick v. Commission of Public Welfare*, 326 Mass. 121, 93 N.E.2d 267 (1950).

The Massachusetts Supreme Judicial Court has strictly construed the Commonwealth's public bidding laws, requiring administrative agencies to comply with all details of the comprehensive scheme. *Modern Continental Construction Co., Inc. v. City of Lowell*, 391 Mass. 829, 840, 465 N.E.2d 1173 (1984); *Phipps Products Corp. v. Mass. Bay Transp. Authority*, 387 Mass. 687, 443 N.E.2d 115 (1982); *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 695 400 N.E.2d 1218 (1980); *Interstate Engineering Corp. v. City of Fitchburg*, 367 Mass. 751, 757, 329 N.E.2d 128 (1975); *Gifford v. Commissioner of Public Health*, 328 Mass. 608, 616, 105 N.E.2d 476 (1952); *Commonwealth v. Gill*, 5 Mass. App. Ct. 337, 363 N.E.2d 267 (1977). Neither this statutory scheme nor MWRA's enabling act authorizes MWRA to require

contractors to execute a collective bargaining agreement as a condition of being awarded a public contract. *See Modern Continental Construction Co., Inc. v. Massachusetts Port Authority*, 369 Mass. 825, 829-30 343 N.E.2d 362 (1976).

C. *MWRA is Violating the Massachusetts Fair Competitive Bidding Laws.*

1. *MWRA Lacks Authority to Reject the Lowest Responsible and Eligible Bidders Who Decline to Execute the Agreement.*

Advertising and awarding of public construction projects are governed by two statutes. One covers the construction of highways, bridges, tunnels and similar structures. M.G.L. c. 30, §39M. The other governs construction or renovation of public buildings, M.G.L. c. 149, §44A *et seq.* Because the Harbor Project requires the construction of both public works and public buildings, both statutes apply. Both statutes share the overriding purpose of opening the competitive bidding process to all contractors to award the contract to the lowest responsible and eligible bidder to construct public projects. *Interstate Engineering Corp. v. Fitchburg*, 367 Mass. 751, 757-58 (1975). M.G.L. c. 30, §39M, c. 149, §44A. A "responsible" bidder is one "possessing the skill, ability and integrity necessary for the faithful performance of the work" and who "shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed . . . in the work" and who meets certain other technical requirements. M.G.L. c. 30, §39M(c) and c. 149, §44A. Bidders must submit a bond promising faithful performance of the agreements contained in the bid, including compliance with all bid specifications. Again, neither statute distinguishes between union and non-union contractors nor refers to collective bargaining agreements.

MWRA has attempted to use the Massachusetts Competitive Bidding Law as its legal basis for imposing the Agreement on all Harbor Project contractors. Pet. Br. 8. Petitioners concede that without Bid Specification 13.1, the Agreement would bind only Kaiser and not the hundreds of contractors who actually will do the work. *Id.* at 7-8; U.S. Br. 10. Under MWRA's Specification 13.1,

failure to execute the Agreement would be a breach of performance, and MWRA could claim all or part of the bond.

However, MWRA's scheme violates the statutes. Automatically rejecting the lowest responsible and eligible bidders if they decline to execute the Agreement as a condition of working for MWRA violates the competitive bidding laws As the Massachusetts Supreme Judicial Court said in *Modern Continental Construction Co., Inc.*, 369 Mass. at 829:

> [U]nionism is not a statutory requirement to be deemed "responsible"' or "eligible" as those terms are used in M.G.L. c. 30, §39M and the statute itself would bar automatic exclusion of any bidder on the sole ground that the bidder employs nonunion workers.

The court emphasized that an agency may not restrict bidding to unionized firms and that coercion of public officials to stop an award of a contract to a non-union bidder would be against public policy. *Id.* at 830. Yet MWRA is doing exactly what *Modern Continental* prohibits: requiring that the lowest qualified bidder unionize as a condition of receiving the contract.

While an awarding agency may impose limited requirements beyond those set forth in the bidding statutes it may not impose illegal or unreasonable requirements, *See Builders Realty Corp. of Mass. v. Newton*, 348 Mass. 64, 67, 201 N.E.2d 825 (1964). Contracts that are inconsistent with the controlling statute or go beyond its scope are void. *Phipps Products Corp. v. MBTA*, 387 Mass. at 692.

The legislature designed the statutory bidding procedures of M.G.L. c. 149 §44A *et seq.*, to substantially reduce the discretion of the awarding agencies and to accomplish

> two fundamental, complementary legislative objectives[:] . . . First, the statute enables the public contracting authority to obtain the lowest price for its work that competition among responsible contractors can secure. . . . Second, the statute establishes an honest and open procedure for competition for public contracts and, in so doing, places all general contractors and subbidders on an equal footing in the competition to gain

> the contract. The statutory procedure facilitates the elimination of favoritism and corruption as factors in the awarding of public contracts and emphasizes the part which efficient, low-cost operation should play in winning public contracts.

Interstate Engineering, 367 Mass at 757-58. *Accord*, *James J. Welch & Co. v. Dep. Comm'r of Capital Planning and Operations*, 387 Mass. 662, 666, 443 N.E.2d 382 (1982); *Phipps Products Corp. v. MBTA*, 387 Mass. at 691-92; *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 696-97; *Morse v. Boston*, 253 Mass. 247, 252, 148 N.E. 813 (1925).

While the first objective is one that would be shared by any private proprietor, the state's second objective -- fostering equal opportunity in the construction industry -- is peculiarly governmental. It is a kind of affirmative action program, opening the bidding process to all firms, union and non-union alike. The possible advantage to any one private owner of so opening the market would not be worth the risk of dealing with an unknown and inexperienced firm when a known and experienced firm is bidding to do the work for nearly the same price. The state, however, has chosen to adopt opening the market as a public policy. Given this special state goal, state agencies, such as MWRA, are unlike private proprietors.

An agency's failure to follow the statutory bidding requirements voids the contract, even if the violation does not harm the public agency, *Phipps Products v. MBTA*, 387 Mass. at 691: *Bowditch v. Superintendent of Streets of Boston*, 168 Mass. 239, 243-44 (1897); or reduces the costs to the public, *Interstate Engineering*, 367 Mass 751; *Grande & Son, Inc. v. School Housing Comm. of N. Reading*, 334 Mass. 252, 258, 135 N.E.2d 6 (1956); *East Side Constr. Co. v. Adams*, 329 Mass. 347, 351, 108 N.E.2d 659 (1952); *Gifford v. Comm'r of Pub. Health*, 328 Mass. at 616; or did not involve bad faith or corruption, *id.* at 617.

MWRA's rejection of bidders who decline to execute the Agreement cannot be justified by the provision of M.G.L. c. 30, §39M(a) that permits the awarding agency to "reject any and all bids, if it is in the public interest so to do." The Massachusetts

Appeals Court has interpreted this provision with appropriate narrowness:

> Except where all bids are rejected, this statute requires the awarding of the contract to the lowest responsible and eligible bidder determined after competitive bids have been filed pursuant to a publicized invitation. The same is true of contracts governed by G.L. c. 149, §§44A-44L. Although it might appear that the word "any" . . . would allow rejection of the low bid so as to result in the awarding of the contract to a person not the lowest responsible and eligible bidder, a long line of cases has determined that contracts subject to those provisions cannot properly be awarded to one other than the lowest responsible and eligible bidder.

Commonwealth v. Gill, 5 Mass. App. Ct. at 339-40.

2. *The "Harmony Clause" Does Not Empower MWRA to Impose the Agreement on Contractors.*

Both M.G.L. c. 30, §39M(c) and c. 149, §44F(2)(I), require bidders to certify that their workers can "work in harmony with all other elements of labor employed . . . in the work." As the Supreme Judicial Court noted in *Modern Continental*, 369 Mass. at 830, "The 'harmony' clause . . . clearly contemplates a situation in which the union and non-union workers work in some type of proximity to one another." By enacting this provision, the Legislature chose, consistent with the NLRA, not to require public works contractors to sign a collective bargaining agreement to obtain a state contract. Rather, the Legislature contemplated that some contractors will be unionized and others will not be. Thus, MWRA cannot persuasively argue that the harmony clause should be stood on its head to authorize it to negotiate a collective bargaining agreement for private sector employees and force unwilling subcontractors to sign.

Moreover, the harmony clause is a request for certification, not an invitation to extortion. A bidder satisfies it by submitting the statutory certification that his workers are willing to work in harmony with others. A qualified lowest bidder's right to receive the contract should not be frustrated by threats from third parties

to disrupt the project unless they are given exclusive arrangements.[6]

3. *MWRA is Violating the Pre-Qualification Provisions of the Fair Competitive Bidding Laws.*

Under the Pre-Qualification provisions, M.G.L. c. 30, §39M(c), c. 29, §8B, c. 149, §44D, of the Fair Competitive Bidding Laws, contractors wishing to obtain state construction work worth more than $50,000, must "pre-qualify" under M.G.L. c. 29, §8B. This requires submitting corporate and financial information and data concerning its experience. Neither the statute nor applicable regulations say anything about willingness to execute a collective bargaining agreement as a condition of the award of a contract. A general bidder who submits a valid certificate of eligibility issued pursuant to these provisions is legally presumed qualified. Bidder pre-qualification "is a cornerstone of the competitive bidding statute." *Modern Continental Construction Co., Inc. v. Lowell*, 391 Mass. at 840. Nothing in the law suggests that unwillingness to execute a collective bargaining agreement is a permissible ground for deciding that a contractor is unqualified. *See id.* The only relevant factor is the contractor's ability to do the work.

D. *MWRA is Violating the Massachusetts Filed Sub-Bid Law.*

The Massachusetts public contracting system is distinctly

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[6]Contrary to Petitioners suggestions, Pet. Br. at 6-8, 25-26, Bid Specification 13.1, J.A. 71 *et seq.*, the Harmony Clause has nothing to do with strikes at the end of labor agreements or disputes between labor and management. It deals only with disputes between groups of employees. However, even before the Agreement was negotiated, the pre-existing trade collective bargaining agreements for the various trades (which are incorporated by reference into the Agreement as Schedules A and B) already prohibited strikes and work stoppages during the terms of those agreements. This is consistent with NLRA §8(b)(4) and (7), which generally prohibits unions from striking to protest the presence of non-union workers. Thus, the "labor strife" that MWRA says it fears seems to be illegal and potentially extortionate.

different from those used by the federal government and most states. Massachusetts insists on dealing directly with each subcontractor, rather than simply hiring a general contractor and letting him hire whatever sub-contractors he wishes. Massachusetts regulates the details of sub-contractors' bids and contracts directly with the primary sub-contractors in each of seventeen statutorily defined trades. Filed Sub-Bid Law, M.G.L. c. 149, §§44A *et seq.* As MWRA itself noted in its Petition, p. 18 n.8, "Massachusetts' competitive bidding laws, to which the Authority's Enabling Act explicitly subjects it, make clear that the competitive bidding process must be carried out by the awarding authority."

The Filed Sub-Bid Law requires would-be sub-contractors on a project to file their bids with the state agency before a general contractor is selected. Each awarding agency must publish specifications for sub-bids in each of seventeen named classes of work and certain sub-trades. M.G.L. c. 149, §44F. Each bidder must submit a detailed sub-bid.

MWRA has executed contracts with each of several general contractors for different aspects of the project and has signed contracts with sub-contractors in most of the seventeen statutory sub-contract classifications. Kaiser has not signed contracts with any of the general contractors or sub-contractors. Kaiser is not the general contractor of the Harbor Project. It is an agent of MWRA and a management consultant. Pet. Br. 4.

The sub-bidder is not required by c. 149 or any other law to execute a collective bargaining agreement. As discussed above, the statute contemplates that union and non-union workers of different sub-bidders can and will work in harmony. Before the Harbor and Central Artery Projects, no Massachusetts agency had ever required a sub-contractor to execute a collective bargaining agreement as a condition of a contract award. In *Rudolph v. City Manager of Cambridge*, 341 Mass. 31, 167 N.E.2d 151 (1960), the Supreme Judicial Court refused to permit an awarding agency to reject an otherwise competent lowest filed sub-bidder on the basis of a local preference. "The statute read as a whole shows an unmistakable intent that the power of the awarding authority to require the

rejection of a subbid, which is in all formal aspects satisfactory, in favor of a higher available bid, may be exercised only for lack of competence of the rejected bidder." *Id.* at 35. Similarly, MWRA cannot reject the lowest qualified bidders because they decline to sign the union-only Agreement.

In short, a review of the regulatory scheme for public contracts and bidding that MWRA must obey shows that MWRA's attempt to set conditions of collective bargaining exceed its authority. No statute expressly authorizes MWRA to require union-only labor on the Project or to authorize Kaiser to negotiate the Project Labor Agreement. MWRA's efforts to force the unionization of the Harbor Project work force extend far beyond the limited objectives of the Commonwealth's public contract laws. Those procurement laws require awarding contracts to the lowest eligible and responsible bidder, unionized or not. Consequently, MWRA cannot defend its conduct "as a legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U.S. 282, 291 (1986). Rather, MWRA's scheme is unconnected to the state concerns defined by the Legislature's procurement laws.

III. Even if MWRA is Acting Within its Statutory Discretion, It Cannot Disguise Its Attempt to Dictate the Terms of Collective Bargaining as Merely "Proprietary."

This Court need not decide any disputed issue of state law to resolve this case. Even if MWRA were to argue that its state law authority could be strained to cover its labor law scheme its argument would undermine its central thesis that it is acting in a purely "proprietary" role exempt from federal regulation.

MWRA may contend that, while its Bid Specification is not expressly authorized by statute, it is nonetheless acting within its administrative discretion under its enabling act. Act 372, §§1, 3(a), 5(a)(ii), 6. MWRA's basic argument does have a superficial simplicity: it claims that private proprietors can insist on agreements like the Agreement here; MWRA, although a state agency, is the proprietor of the Harbor Project, with broad statutory discretion to

spend the ratepayers' money to develop state property; so why should MWRA not have the same proprietary economic rights that private proprietors have? MWRA seeks to import into labor law the "proprietary" versus "regulatory" distinction of Commerce Clause cases such as *White v. Mass. Council of Construction Employers, Inc.*, 460 U.S. 204 (1983).

However, this is not a state's rights case. UCANE agrees with ABC's analysis of why the "regulatory" versus "proprietary" distinction has no place in federal labor law. A brief look at the state law source of MWRA's powers and function confirms this analysis. First, under Massachusetts law, MWRA is not a mere proprietor empowered to do whatever it sees fit but barred from regulating. Rather, MWRA's enabling act makes it an agency of limited powers and functions but inextricably interweaves its authority to regulate the water and sewer system with its authority to renovate that system. The more sweeping the interpretation of MWRA's authority, the more clearly impossible it is to distinguish a "regulatory" from a "proprietary" role. Second, a survey of MWRA's position under state law illustrates the unworkability of Petitioners' proposed distinction between preempted regulatory conduct and permissible proprietary conduct. A state agency, like MWRA, impermissibly invades the protected sphere of collective bargaining when its activities have a direct and substantial effect on that sphere, however it labels its interference. Finally, Massachusetts law prevents MWRA from using Kaiser as a mask to disguise its scheme as one within the NLRA's limited exception for pre-hire agreements in the construction industry. Under Massachusetts law, the Agreement is between MWRA and BCTC, not between Kaiser and BCTC; MWRA is not a "construction industry employer." Therefore, the scheme falls outside the limited exceptions in NLRA §8(e) and (f) for construction employers who make pre-hire agreements that otherwise would be unfair labor practice under §8(a) and (b).

A. *A State Infringes Federally Guaranteed Liberties When it Dictates a Collective Bargaining Agreement to Private Parties, Even if it Enforces its Commands by Threatening to Withhold State Funds.*

1. *Because the State Simultaneously Acts as "Regulator" and "Proprietor" the Distinction Between the Two Roles Has No Place in Federal Labor Law.*

MWRA's simplistic argument ignores the fundamental principle of American government: our democratic government is one of limited powers. When the public interest requires delegating to a governmental agency great power to accomplish great public ends, it becomes all the more important to require the agency to respect individual rights. As this Court said in *Gould*, 475 U.S. at 290, "government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints." The First Circuit pointed out below that "the entire Bill of Rights," 935 F.2d at 358 n.26, is an example of those special restraints imposed on state action, whether that action is characterized as "regulatory" or "proprietary." The right to be "free of governmental regulation of the 'peaceful methods of putting economic pressure upon one another' *Machinists*, 427 U.S. at 154, is a right specifically conferred on employers and employees by the NLRA." *Golden State Transit Corp. v. City of Los Angeles (Golden State II)* 493 U.S. at 112. It is a "guarantee of freedom for private conduct that the State may not abridge." *Id.* Accordingly, the NLRA "treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play." *Gould*, 475 U.S. at 290.

MWRA's own role, mixing regulatory and proprietary activities as no private owner could and pursuing its regulatory mission by regulatory means, illustrates this point. Unlike every private proprietor, MWRA need not be concerned about the costs of its Project. It is a state monopoly that can raise water and sewer rates as high as it needs to in order to raise the money it spends. It does not need the approval of any other agency to set the rates as it sees

fit. Act 372, §§6(k), 10. MWRA's statutory mission, defined by its enabling act, is the quintessential regulatory task of promoting the general health and welfare, protecting the environment, *id.*, §1, and ensuring compliance with state and federal environmental laws, §8(i). MWRA alleges that the scheme challenged here was adopted to accomplish its statutory mission. The Massachusetts Legislature has ordered MWRA both to "operate" and to "regulate" concerning water and sewage systems. Act 372, §1. The act empowers the agency to "develop its rules and regulations," §5(a)(ii); "to adopt and enforce procedures and regulations," §6(e); "to enter into contracts, arrangements and agreements with other persons in all matters necessary or convenient to the operation of this act," §6(o); and "to do all things necessary, convenient or desirable for carrying out the purposes of this act or the powers expressly granted or necessarily implied by this act," §6(r). Moreover, "the exercise by the Authority of the powers conferred" by the act are "deemed to be the performance of an essential public function." §3(a).

Under Massachusetts law the challenged Bid Specification is a regulation. State law defines a "regulation" as a "requirement of general application and future effect, adopted by an agency to implement . . . the law enforced or administered by it." M.G.L. c. 30A §1(5). There is no question that the Bid Specification is a requirement of general application and future effect: MWRA's Board formally voted its approval of the Project Labor Agreement as an official policy and directed that the Bid Specification shall apply to every one of thousands of bidders on hundreds of contacts over the life of the Harbor Project. Pet. Br. 7-8. MWRA claims that the Bid Specification is a necessary or convenient method of implementing its enabling act which directs it to complete the Harbor Project. Pet. Br. 8 n.3, 25-26. Petitioners concede that the Agreement would not itself be binding on any general contractor or subcontractor but for the Bid Specification forcing each such contractor to execute the Agreement. *Id.* at 7-8; U.S. Br. 4, 10. Under the general bidding regulations any successful bidder who fails to comply with Bid Specification 13.1 by unionizing his workers would be severely penalized. He would automatically lose

a deposit equal to five percent of the contract price. M.G.L. c. 30, §39M, c. 149, §44B(3),(4). MWRA has adopted regulations authorizing it to impose additional civil penalties on anyone for failing to comply with any of its regulations, orders, requirements, or approvals. 360 C.M.R. §2.03, §2.05; MWRA apparently could invoke this penalty provision against bidders who defy its union-only requirement.

Whether one calls MWRA's union-only requirement a "bid specification" or a "regulation" makes no practical difference at all. "The effect of such 'conditions' on the ability . . . to deal with affected firms would be virtually identical to the effect of a conventional market regulation requiring such practices." *White v. Mass. Council of Construction Employees*, 460 U.S. 204, 220 (Blackmun, J. dissenting). Mr. Justice Blackmun has explained clearly why this sort of requirement is, in practical effect, regulatory:

> The power to dictate to another those with whom *he* may deal is viewed with suspicion and closely limited in the context of purely private economic relations. When exercised by government, such a power is the essence of regulation.
>
> Attempts directly to constrict private economic choices through contractual conditions are particularly akin to regulation because, unlike simple refusals to deal but like conventional market regulation, they threaten to extend their regulatory impact well beyond the transaction in which the State has an interest.
>
> . . .
>
> But when a State attempts to arrogate unto itself the "independent discretion" of others to deal with whom they please it exercises regulatory power . . . .

Id., at 219-20, 221 (emphasis in original). While in the Commerce Clause context, this practical effect was not held to be enough to strike down the state action, "[w]hat the Commerce Clause would permit States to do in the absence of the NLRA is . . . an entirely different question from what States may do with the Act in place." *Gould*, 475 U.S. at 290. As discussed in Part I above, and

contrary to Petitioners' claim, Pet. Br. 26, MWRA's restriction on private economic choice in collective bargaining does indeed extend its regulatory impact well beyond MWRA's own Harbor Project contracts. This governmental interference with private individual choice is precisely what the preemption doctrine under *Machinists* 427 U.S. 132, is intended to avoid.

2. *Under the NLRA, State Action is Preempted if its Effect is to Dictate Collective Bargaining Terms to Private Employers and Employees.*

If federal labor law is to protect the individual rights that Congress intended, the only practical test of preemption is the objective effect of the state's action, not the label the state chooses or the means the state uses. "Judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Golden State Transit Corp v. Los Angeles*, 475 U.S. 608, 614 n. 5 *quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). In other federal preemption contexts this Court has decisively rejected

> the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. . . . [S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy -- other than frustration of the federal objective -- that would be tangentially furthered by the proposed state law.

Perez v. Campbell, 402 U.S. 637, 651-52 (1971). So too, in labor law if a state infringes a protected federal right, good intentions do not immunize the state's actions.

When a state's activities substantially and directly limit private collective bargaining then it regulates collective bargaining and its activities are preempted by the NLRA, even if the state asserts another purpose or effect. *See Gade v. National Solid Waste Management Assn.*, 60 U.S.L.W. 4587 (1992) (state law

requirement that directly, substantially, and specifically regulates occupational safety and health is an "occupational safety and health standard" within meaning of Occupational Safety and Health Act preemption clause, even if it has another non-occupational purpose and/or effect).

MWRA's use of the state's spending power to control private collective bargaining does not save its scheme. In areas of the law "outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions that are permissible for private parties." *Gould*,475 U.S. at 290. A private employer can fire an at-will employee for expressing political opinions he dislikes, but the First Amendment prohibits a state from doing so. *Elrod v. Burns*, 427 U.S. 347 (1976).

Because MWRA's Bid Specification compels all successful contractors to sign the specific collective bargaining Agreement negotiated by Kaiser on behalf of MWRA, the Specification is preempted.

B. *Under Massachusetts Law, the Agreement is Not Between Kaiser and BCTC and So Does Not Fit into the Exemptions in §8(e) and (f) of the NLRA.*

The Petitioners and the United States rest their case on their claim that MWRA is doing no more than any private proprietor could do. Pet. Br. at p. (i) (Question Presented); U.S. Br. at p. (i). Their argument can support the weight of their case only if MWRA really is doing no more than a similarly situated private proprietor could do under the NLRA. But a private proprietor could not carry out MWRA's scheme.

A private proprietor can obtain the §8(e) and (f) exemptions from the NLRA's prohibitions on unfair labor practices only if the agreement in question is "between a labor organization and an employer in the construction industry," §8(e). *Accord*, §8(f) (exemption for agreement between "employer primarily engaged in the building and construction industry" and union having members who are construction employees). The Petitioners claim that the Agreement is within these exemptions because it is between Kaiser and the BCTC; and Kaiser is a "construction industry employer."

Pet. Br. 28. In turn, Bid Specification 13.1 allegedly is legal because it carries out the terms of the Agreement by requiring all contractors to execute the Agreement. *Id.* and at 7, 8 n.3.

It is undisputed that Kaiser negotiated and entered into the Agreement as the authorized agent of MWRA. *Id.* at 7; U.S. Br. 3-4. The Agreement itself states in bold capital letters on the cover that Kaiser is acting "ON BEHALF OF THE MASSACHUSETTS WATER AUTHORITY." MWRA ratified its agent's action after reviewing the Agreement. *See* Pet. Br. 7; U.S. Br. 4. For the purposes of this litigation, the crucial provision of the Agreement is §2. It limits MWRA's "absolute right to select any qualified bidder" by obliging MWRA to select only bidders "willing ready and able to execute and comply with the Project Labor Agreement." §2(a). All contractors "shall be required to accept and be bound by the terms and conditions of this Project Labor Agreement." §2(b). Petitioners concede that only MWRA, not Kaiser, could give these provisions any effect by imposing Bid Specification 13.1. Pet. Br. 8; U.S. Br. 4. Surely Kaiser would not have made a promise it knew it could not keep and BCTC would not have made concessions in return for a promise it knew was worthless. The Agreement expressly binds Kaiser itself only insofar as Kaiser may someday employ craft workers to do construction work on the Project. Agreement, Introduction ¶ 3. In short, this is a classic instance of a contract entered into by an agent on behalf of a disclosed principal.

"The law is settled in Massachusetts that '[u]nless otherwise agreed, a person making or purporting to make a contract for a disclosed principal does not become a party to the contract.' *Porshin v. Snider*, 349 Mass. 653, 655 (1965)." *Paterson-Leitch Co., Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 840 F.2d 985, 993 (1st Cir. 1988) (construction manager that negotiated and signed project labor agreement was agent for owner and as such was not bound by the contract). This has been the law of Massachusetts for over a century. *IRS v. Blais*, 612 F.Supp. 700, 706 (D. Mass. 1985); *Cass v. Lord*, 236 Mass. 430, 432, 128 N.E.2d 716 (1920), *Goodenough v. Thayer*, 132 Mass. 152 (1882).

Therefore, Kaiser is not in privity of contract with the BCTC as to the provisions of the Agreement requiring unionization. Therefore, the Agreement is not an agreement between a "construction industry employer" and unions; it does not come within the §8(e) and (f) exceptions and does not provide any cover for MWRA's bid specification.[7] It would not come within those exceptions even if MWRA were a private party.[8]

MWRA itself is not a "construction industry employer" but a public water and sewer agency. Petitioners explicitly say that they do not claim that MWRA is a "construction industry employer," as

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[7]Even if one were to assume *arguendo* that Kaiser *is* the "employer," then MWRA's delegating the power to negotiate to Kaiser and then imposing Bid Specification 13.1 to enforce Kaiser's union-only Agreement would violate the Massachusetts constitutional rights of contractors and their employees. Articles I, X and XII of the Declaration of Rights of the Massachusetts Constitution protect all persons in the enjoyment of their life, liberty and property, including the right to engage in a lawful occupation. *McMurdo v. Getter*, 298 Mass. 363, 365-66, 10 N.E.2d 138 (1937). Delegating to private parties, such as Kaiser, the right to regulate the terms and condition of employment of other persons deprives the involuntarily regulated persons of their constitutional right to engage in a lawful occupation. *Opinion of the Justices to the Senate*, 337 Mass. 796, 799, 151 N.E.2d 631 (1958). Even if NLRA §8(f) permits a private proprietary or private construction industry employer to exercise such power, the Massachusetts Constitution prohibits the MWRA from assisting Kaiser in doing so by imposing the Agreement by means of Bid Specification 13.1.

[8]Because MWRA's action does not fall within the §8(e) and (f) exemptions, it follows by the logic of the argument presented by the United States, that MWRA's conduct interferes with the federally protected rights of employees under NLRA §7 to select their own representatives and so is preempted under the *Garmon* preemption doctrine. U.S. Br. n. 15, *citing San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and *Brown v. Hotel Employees Union Local 54*, 468 U.S. 491, 501 (1984).

defined in §8(e) and (f). Pet. Br. 28. A private proprietor acting as MWRA has done also would not be a "construction industry employer." The NLRB and the federal courts have recognized two tests to decide whether a firm is a "construction industry employer": (1) whether it obtains most of its revenue from performing construction work, *Carpet Linoleum & Soft Tile Local Union No. 1247, Painters (Indio Paint and Rug Center)*, 156 NLRB 951, 61 L.R.R.M. 1191 (1966); *see NLRB v. W.L.Rives Co.*, 328 F.2d 464, 469 (5th Cir., 1964); or (2) whether, it is an owner acting as its own general contractor, *A.L. Adams Construction Co. v. Georgia Power Co.*, 733 F.2d 853, 858 (11th Cir. 1984), *cert. denied* 471 U.S. 1074 (1985) MWRA does not obtain significant revenue from doing construction work; rather, it obtains its revenue from water and sewer ratepayers. Act 372, §10. Nor is MWRA the general contractor on the Harbor Project; rather it has contracted with several general contractors for the various phases of the project.[9] Pet. Br. at 4. Thus, a private party that did what MWRA has done would not qualify for the exemptions in NLRA §8(e) and (f). Petitioners' central analogy fails and with it their entire argument.[10]

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[9]Kaiser is not one of these general contractors. Rather, it is the project manager. Pet. Br. 4. Kaiser has not entered into contracts with any of the general contractors or sub-contractors. Under Massachusetts law, MWRA itself is required to execute the contracts. M.G.L. c. 30 §39M, c. 149 §44A *et seq.*

[10]MWRA can no more hide behind the general contractors than it can hide behind Kaiser. It is undisputed that the general contractors and subcontractors had nothing to do with negotiating the agreement but rather are required by MWRA's Bid Specification to execute the Agreement. Pet. Br. 7-8. Moreover, as shown above at pp. 10-14, unlike a private proprietor, MWRA is prohibited by state law from refusing to accept bids from qualified bidders solely because they are not unionized. Petitioners have impliedly conceded this when they stress that the bidding process is open to all firms and workers (who are willing to unionize). Pet. Br. 8,

(continued...)

The correct analogy is not between MWRA and a hypothetical private proprietor but between MWRA and NLRB. Like NLRB, MWRA is a government agency that is prohibited from interfering with economic competition among private parties. *Machinists* 427 U.S. at 144-151. The NLRB's authority in labor law is much greater than a state's, but even the NLRB cannot impose the terms of a collective bargaining agreement on private parties or force them to agree. *See* NLRA §8(b). That is exactly what MWRA is trying to do here and it is exactly what federal law preempts.

CONCLUSION

At bottom, this case is about a state agency that has surrendered to union threats of strikes and picketing and has made a political accommodation to reject all qualified lowest bidders who decline to unionize on the unions' terms. The losers are all those firms that could save the public money by underbidding the firms that have accepted the unions' terms and all those employees who choose to exercise their federal rights not to join unions. The people of Massachusetts also lose. By denying qualified contractors and employees work on the Harbor Project that they are

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[10](...continued)
26. Furthermore, MWRA has not insulated itself by hiring a general contractor who in turn would hire subcontractors and then, acting as a "construction industry employer" would force them to unionize pursuant to NLRA §8(e) and (f). As explained above, state law requires MWRA itself to contract directly with all of the general contractors and primary subcontractors. M.G.L. c. 149 §§44A *et seq.*

Bizarrely, MWRA claims far more power to interfere with the freedom of choice of the employees of third parties than it has regarding its own employees. *See* M.G.L. c. 150A, §§ 2, 4, 12, prohibiting all state agencies, including MWRA, from compelling unionization of their employees, and from compelling payment of any sum by any employee to a union except defined service fees to unions previously elected by a majority of employees. Moreover, even these collective bargaining agreements cannot run more than three years. *Id.* §7.

entitled to, the MWRA's union-only scheme violates state law. It denies contractors such as many of UCANE's members their federally guaranteed right to bargain collectively for themselves rather than have the terms of employment dictated by the state. Most basically, MWRA's discriminatory scheme is grossly unfair and is preempted by the National Labor Relations Act. For the reasons stated above and in the Respondents' Brief, the judgment of the First Circuit en banc should be affirmed.

DATED: Boston, Massachusetts: September 8, 1992.

Respectfully submitted,
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September, 1992